IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5041

CHARLES W. BRITT, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NORTH CAROLINA

BRIEF OF PETITIONER, CHARLES W. BRITT, JR.

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OPINION BELOW

Petitioner was first tried during the November 10, 1969, Session of the Superior Court Division of the North Carolina General Court of Justice in Craven County which trial ended on November 14, 1969 in a hopeless deadlock. The indigent defendant moved for a transcript of the evidence of this first trial at the expense of the state; however, this motion was summarily denied.

Petitioner was, again, tried during the December 18, 1969, Session of the Superior Court Division of the North Carolina General Court of Justice in Craven County on the original indictment charging him with the first degree murder of one JANIE BANKS on March 24, 1969. At this trial he

was found guilty of second degree murder and sentenced to the maximum sentence of thirty (30) years in prison from which an appeal was filed in the North Carolina Court of Appeals. In the decision of the North Carolina Court of Appeals, *State v. Britt*, 8 N.C. App. 262, 174 S.E.2d 69 (filed May 27, 1970), the court found no error and affirmed the conviction. Petitioner filed a petition for certiorari to the North Carolina Supreme Court which was denied.

Petitioner has filed this petition for writ of certiorari in the Supreme Court of the United States which has now been allowed.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS IMPOSED

The Petitioner contends that the failure and refusal of the trial court and in turn the Court of Appeals to provide him with a transcript of the evidence of the first trial denied him his basic rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

The Petitioner further contends that the failure of the trial court to grant his motion *in limine* together with the admission of evidence with respect to fingerprints and the admission of evidence with respect to in-custody statements by the defendant (which action by the trial court was subsequently approved by the Court of Appeals) denied him his basic rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

1. Did the Trial Court err in refusing to order this indigent defendant to be furnished with a transcript of the evidence at the first trial which resulted in a mistrial for use in connection with the second trial which ended in his conviction of second degree murder?

2. Did the Trial Court err in refusing to grant the defendant's motion *in limine*?

3. Did the Trial Court err in admitting fingerprint evidence when it was shown that the defendant had been at the scene earlier on the same day as the alleged crime and that there was at least one fingerprint which was unidentifiable?

STATEMENT OF FACTS

On March 25, 1969 JANIE BANKS was found dead, lying on the floor of her living room with wounds about her head, a shallow stab wound on her back and a cut on her right wrist. (A. 46)

Subsequently, the defendant was questioned on March 29, 1969 at the home of ETHEL BEST and then at the police station, but he was not given his *Miranda* warning until after the questioning at the apartment. (A. 25, 26)

On April 2, 1969, the defendant was arrested without a warrant (A. 26, 32, 37) and placed in jail and held without further procedure until April 7, 1969, when the Coroner's Inquest was held and the defendant was bound over to the Grand Jury.

Though Mr. Dowdy and Mr. Bratcher of the New Bern Police Department investigated the alleged crime, they kept no records and made no reports of any conversation with the defendant. (A. 29, 37)

The defendant was first put on trial on November 11, 1969 which ended in a mistrial on November 14, 1969. (A. 11) The indigent defendant moved for a transcript of the evidence and testimony at the expense of the state which motion was summarily denied. (A. 11-13)

Prior to the second trial, the defendant filed his motion *in limine* which was, also, summarily, denied. (A. 13 and 14)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA

§14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premediated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

§7A-450. *Indigency; definition, entitlement; determination.* (a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter.

(b) Whenever a person, under the standards and procedures set out in this subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.

§7A-454. *Supporting services.*—The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and

expenses accrued under this section shall be paid by the State.

ARGUMENT

STATEMENT, ARGUMENT AND AUTHORITY UNDER QUESTION ONE

Statement

On November 11, 1969, Petitioner was arraigned and placed on trial for his life. On November 14, 1969, after the case had been submitted to the jury, the jury reported a hopeless deadlock and a mistrial was ordered. (A. 11) The Petitioner moved for a free transcript of the evidence as an indigent for use in connection with the second trial which motion was denied by the trial judge. (A. 11, 12)

ARGUMENT AND AUTHORITY

I. THE PETITIONER WAS DENIED *DUE PROCESS OF LAW* IN THE REFUSAL OF THE COURT TO ALLOW PETITIONER A TRANSCRIPT OF THE FIRST TRIAL WHICH RESULTED IN A MISTRIAL.

As far back as 1956 this court said in *Griffin v. Illinois*, 351 U.S. 12, 19, that: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Following the *Griffin* decision this court has consistently required that free transcripts be furnished to indigents on appeals, and that the state furnish an indigent defendant with every substantial litigation asset which a person with money could buy at least where it is practicable for the state to do so at no cost other than a financial one. See *Draper v. Washington*, 372 U.S. 487, and *Long v. District Court of Iowa*,, 385 U.S. 192.

In any criminal case involving an indigent, the prosecution and the indigent defendant are grossly mismatched with the indigent being the disadvantaged. The inability of

a poor or indigent defendant to obtain full assistance in the development of defense without a transcript of the evidence at prior proceedings is inconsistent with the American fundamental principal of "equality before the law." To reduce the influence of poverty and to insure balance, the state should provide the poor or indigent defendant with such minimal services as a copy of the transcript of evidence taken at all prior proceedings in order to assist in the development, preparation and presentation of his defense.

At present, the poor or indigent defendant in North Carolina often lacks the tools to defend against the prosecution's contentions. Additional assistance (other than the mere presence of a person or "body" possessing a law license) is necessary for equal protection, representation and opportunity to defend; such assistance should be constitutionally mandated.

Defendant's poverty may make his attempts at defense so ineffective that to deny him necessary additional assistance such as a transcript of a previous trial or hearing is to deny him the basic foundation of a fair and equitable proceeding and would reduce the trial to a "meaningless ritual." In addition, an opportunity to prepare a defense is no less essential to the poor or indigent defendant than is the opportunity to prepare an appeal which has been deemed an essential element of fundamental fairness in *Douglas v. California*, 372 U.S. 353. See 32 Missouri Law Review 543, 549 (1967).

In *Griffin v. Illinois, supra,* this court considered the impact of poverty on constitutional rights under the equal protection clause. This court held that a state may not deprive indigent defendants of adequate review of alleged trial error solely because of their inability to pay the costs of necessary transcripts. There is apparently no "rational relationship" between the ability to pay for a transcript and the guilt or innocence of defendants, and any discrimination based on poverty violates the equal protection clause. See 43 Cornell Law Quarterly 1 (1957). Also, see *Smith v.*

Bennett, 365 U.S. 708, 714 (1961), where this court indicated that the policy of the equal protection clause is such that "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." The *Griffin v. Illinois, supra,* and the *Douglas v. California, supra,* and the *Smith v. Bennett, supra,* doctrines, considered with respect to preparation of adequate defense, seem to require at least that a state provide assistance at the trial level if that assistance is necessary to the adequate preparation prior to trial and cross-examination during the course of the trial.

In a more recent decision in the Second Circuit in *United States ex rel. Wilson v. McMann,* 408 Fed.2d 896, it was held that the denial of defendant's application, prior to commencement of the second trial, for the evidentiary portion of the transcript, deprived defendant of his Constitutional right to equal protection of the law.

In that case the defendant was convicted in a New York State Court of a narcotics violation arising out of a sale to an undercover agent. Three other prosecution witnesses corroborated the undercover agent's testimony in varying degrees, but the first trial ended in a hung jury. Prior to the commencement of the second trial, assigned counsel applied for a transcript of the first trial. This application was denied, summarily, even though counsel argued that a denial would deprive the defendant, who was indigent, of equal protection of the laws and due process.

During the trial, when defense counsel attempted to impeach the undercover agent by asking him whether his testimony on a particular issue had changed since the first trial, the trial court ordered a partial transcript. Counsel for both sides met with the court reporter and went over the transcript, but it developed that the defense counsel's memory was faulty and that the undercover agent's testimony on the issue at the first trial was entirely consistent. Defendant was found guilty; and, after exhausting his state remedies, he sought a writ of habeus corpus, contending

that the denial of the transcript of the prior trial deprived him of equal protection of the law.

The petition was denied, but, on appeal, the Second Circuit reversed and remanded for a new trial. The court first noted that the transcript of the first trial would have been valuable to defense counsel both for impeachment and for preparation, and that the defendant was prevented only by indigency from obtaining it.

The appellate court rejected the state's contention that the error was harmless because defense counsel was permitted to see the Grand Jury testimony. It also, emphatically rejected the notion that the fact that Wilson was represented throughout by the same attorney excused the denial of the transcript. The court stated that counsel's recall should not be expected to be perfect, and pointed to the fact that counsel's mistaken memory caused an abortive attempt to impeach the undercover agent, unsuccessfully, and which in turn, unfortunately, brought out the consistencies. Had the trial court granted the motion for the transcript at the beginning, the Court of Appeals wrote, defense counsel would have read the undercover agent's testimony at the first trial and the entire train of events so prejudicial to the defendant would not have occurred. Limited access, the appellate court held, is a breeder of confusion and delay, and despite the best intentions of the trial judge may cause grave prejudice to the defense, as in this case. A new trial was therefore ordered.

The Court of Appeals of New York in *People v. Zabrocky*, 311 N.Y.S.2d 892, has since held that the denial of a motion to provide indigent defendants with a free copy of the minutes of a supression hearing is, under that state's law, prejudicial error requiring a new trial despite the prosecution's contention of harmless error. ". . . the use to which a requested transcript may have been is irrelevant."

II. THE DEFENDANT WAS DENIED *EFFECTIVE ASSISTANCE OF COUNSEL* IN THE REFUSAL OF THE COURT TO ALLOW DEFENDANT A TRANSCRIPT OF THE FIRST TRIAL WHICH RESULTED IN A MISTRIAL.

The Sixth Amendment to the Constitution of the United States promises the assistance of counsel for one's defense. A person who is accused of a serious crime has the right to be assisted by appointed counsel if he cannot afford to employ an attorney of his own. As far back as *Powell v. Alabama*, 287 U.S. 45 (1932), this court asserted that the duty to appoint counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." The word "effective" sets no concrete standard but rather connotes the state of being capable of bringing about and effect. The defendant's attorney is incapable of giving effective aid unless at least a transcript of former trials and hearings is at his disposal.

The requirement of the Sixth Amendment to the Constitution of the United States has been made applicable to the states under the Fourteenth Amendment in *Powell v. Alabama, supra, Escobedo v. Illinois*, 278 U.S. 478; *Gideon v. Wainwright*, 372 U.S. 335, among other cases. However, as above stated, a defendant's right to the assistance of counsel is not satisfied by the mere formality of appointing an attorney by the court; the indigent defendant is entitled to *effective* representation throughout the course of the proceedings. See *Avery v. Alabama*, 308 U.S. 444; *Wade v. Mayo*, 334 U.S. 672; *Hawk v. Olson*, 326 U.S. 271; and *Hudson v. North Carolina*, 363 U.S. 697. The duty of the court in the protection of an indigent defendant is not discharged when counsel is precluded by the action of the court from giving his client effective assistance. *White v. Reagan*, 324 U.S. 760; *Powell v. Alabama*, 287 U.S. 45; and *Lyles v. Beto*, 329 Fed.2d 332 (C.A. 5).

The Sixth Amendment does not demand a favorable conclusion for the indigent, but effective assistance does require that each defense in the defendant's favor should be sought out, efficiently prepared, and adequately presented. If the "assistance" of the Sixth Amendment guarantee is emphasized in conjunction with the necessity of "effective" representation, the transcript of the first trial must be supplied.

In the instant case counsel for the indigent defendant was precluded from the benefit of the transcript of the first trial in preparation for the second trial as well as in the cross-examination of the witnesses for the prosecution. Because of the nonavailability of the transcript of the first trial counsel for the defendant in the instant case was prevented from testing his recollection with respect to the testimony particularly in connection with the witness Bratcher. Counsel for the defendant recalls that the witness Bratcher at the first trial testified that he, alone, used the fingerprint equipment and that he found an unidentifiable fingerprint on a water glass which was handled, admittedly, by the defendant. (A. 42) However, counsel for the defendant was afraid that if he pursued the cross-examination of the witness Bratcher, it would turn out that counsel's recollection was in error, and instead of pointing out the inconsistencies in the witness's testimony, the witness's testimony on this point would be blown out of proportion.

There is no question but that the defendant could have bought from the court reporter a transcript of the first trial if he had had the money. However, he did not have the money so that the quality of justice turned purely and simply on the defendant's indigency. Therefore, the defendant was deprived of the effective assistance of counsel.

III. THE DEFENDANT WAS DENIED *EQUAL PROTECTION UNDER THE LAW* IN THE REFUSAL OF THE COURT TO ALLOW DEFENDANT THE TRANSCRIPT OF THE FIRST TRIAL WHICH TERMINATED IN A MISTRIAL.

The full purport of the holding in *Griffin v. Illinois, supra,* is yet to be completely developed. However, it is possible to state its principal comprehensively as a command that the state which prosecutes an indigent must furnish him every substantial litigation asset which a nonindigent defendant can buy, at least where it is practicable for the state to do so at no cost other than a financial one. Certainly the most immediate implication of the *Griffin* decision itself and the *U.S. ex rel. Wilson v. McMann* decision require that the state record and transcribe at public expense all of the court proceedings in an indigent case, and that the indigent be given transcripts of all the preliminary proceedings in his case and perhaps related cases in adequate time to make use of them for trial preparation.

Following the *Griffin* decision, this court has required the provision of free transcript to indigents on both direct and collateral criminal appeals, *e.g., Draper v. Washington,* 372 U.S. 487 (1963); *Long v. District Court of Iowa,* 385 U.S. 192 (1966); the waiver of filing fees for both appeals and collateral attack proceedings, *Byrd v. Ohio,* 360 U.S. 252 (1959); *Smith v. Bennett,* 365 U.S. 708 (1961); and the provisions of appointed counsel on at least a criminal defendant's first appeal as of right from his conviction, *Douglas v. California,* 372 U.S. 353 (1963); *Swenson v. Bosler,* 386 U.S. 258 (1967).

STATEMENT, ARGUMENT AND AUTHORITY UNDER QUESTIONS TWO AND THREE

Statement

There was evidence introduced in the instant case that the defendant and Ethel Best were at the decedent's home between 3:00 and 3:15 o'clock in the afternoon on the day and date of the alleged crime. (A. 27, 31, 32, and 43) There was similar testimony at the first trial. Also, there was testimony that either Mr. Dowdy or Mr. Bratcher lifted a fingerprint from the crime scene which was transmitted to the State Bureau of Investigation's fingerprint expert together with fingerprint cards of persons possibly connected with the case, and there was one print which the expert was able to identify and unable to match. (A. 40) There was similar testimony at the first trial. As the result of the state of the evidence at the first trial, the defendant filed a motion *in limine* to preclude the use of such testimony until such time as the prosecution could show its materiality. (A. 13) This motion was, summarily, denied. (A. 14) The evidence of fingerprints was admitted over the defendant's objection. (A. 23, 24, 25, 38-45)

Argument and Authority

Conviction by use of inadmissible testimony is a denial of due process and the equal protection of the laws.

In 1937 in 109 A.L.R. 1089 the editors of that renown publication pointed out that there was an increasing problem with complaints against opposing counsel who asked prejudicial questions without any plausible *legal* foundation. Since then the need for motions *in limine* has steadily increased.

Besides the clear-cut situations referred to in 109 A.L.R. 1089, many times there is a difference of opinion between "logical relevancy" and "legal relevancy" which cannot be resolved without a court ruling.

If prejudicial matters are brought before the jury, no amount of objection or instruction can remove the harmful effects, and the party is powerless unless he wants to forego his chance of a trial and ask for a mistrial. Once the questions are asked, the harm is done. Under the Harmless Error Rule, many of these matters would probably not be reversible error as in this case even though they have a subtle and devastating effect on the case. Perhaps the greatest single advantage of a motion *in limine* is the avoidance of objecting in the jury's presence to evidence which is "logically relevant." Jurors cannot be expected to understand why they should not be allowed to consider all evidence which is related to the case, and will usually resent the fact that an objection kept them from hearing it.

Another advantage of these motions is that they allow the trial judge an opportunity to study the question and the authority involved. However, in the instant case the judge listened to no argument, but, rather, summarily denied the motion.

While it is arguable that there is no logical basis for a trial judge to anticipate offers of evidence as attorneys are charged with the ethical responsibility of not undertaking the introduction of evidence or testimony which they know or have reasonable grounds to believe is inadmissible, and also because of the mass of holdings that evidentiary rulings can be cured by "instructions" to the jury, nonetheless, as a practicable matter, it must be conceded that under our adversary system the trial lawyers and the trial judge often fail to make the fine distinctions between "logical relevancy" and "legal relevancy." It is quite probable that the tangible value of not having to object to evidence that would appear to a jury to be material and relevant is a great advantage to all concerned.

The trial judge should have known and must have known the state of the evidence with respect to the fingerprints because he presided at the first trial which ended in a mistrial. (A. 11 and 14) The denial of the motion *in limine*

denied this defendant a fair and impartial trial, due process, and equal protection.

The fingerprint evidence concerning which this case was made, would appear to be immaterial in North Carolina under *State v. Minton,* 278 N.C. 518, 46 S.E.2d 296 (1948) which is cited in the motion. (A. 13)

It is conceded that evidence regarding fingerprints by a qualified witness is admissible to establish identity in North Carolina. See *State v. Huffman,* 209 N.C. 10, 182 S.E. 705 (1935). Also, proof that fingerprints found in the place where a crime was committed, under such circumstances that they could *only* have been impressed at the time the crime was committed, corresponded to those of the accused, may be sufficient proof of identity to sustain a conviction. See *State v. Tew,* 234 N.C. 612, 68 S.E.2d 291 (1951).

In the *Tew* case it was held that testimony of a fingerprint expert tending to show that fingerprints found on a piece of glass which had fallen from the front door from which it was broken to the inside of a filling station alleged to have been entered by the defendant, personal property being stolen therefrom, correspond with those of the defendant taken after his arrest, coupled with the testimony of the complainant that though she personally attended her service station, she did not and had not seen the defendant before the date of the crime, was sufficient to take the case to the jury and support a finding by it that the defendant was present when the crime was committed and that he at least participated in its commission. In this case there was evidence to the effect that the defendant had never been to the service station, and that his prints could not have been on the glass unless he was there *at the time of the crime.*

Where it appears that there were at the scene of the crime fingerprints other than those identified as the defendant's, and which are neither identified nor explained, the proof of the defendant's prints is not sufficient to support a conviction and is, therefore, immaterial.

Thus, in *State v. Minton, supra,* the court declaring that the fact the fingerprints corresponding to those of the accused are found in a place where a crime is committed is without probative force unless the circumstances are such that the fingerprints could only have been impressed at the time the crime was perpetrated, held that testimony that the print of the left thumb of one accused of breaking and entering with intent to commit larceny, and of larceny, appeared upon the outside of a piece of glass which originally occupied a position near the knob of the front door of the place entered, which was a public place, had no legitimate tendency to show that he was present when the shop was broken and entered and coins were taken therefrom. It appeared in that case as in the case against this defendant, *Britt,* (1) that there were fingerprints at the scene other than those identified as the defendant's, (2) that the expert witness testified that there was no way of knowing when the defendant's print was impressed upon the object or whose the other prints were, and (3) that the defendant had in fact entered the crime scene earlier.

Ervin, J. (now Senator), speaking for the court said that such evidence found at a scene of a crime has no probative force unless the circumstances are such that the prints could have been impressed only at the time that the crime was perpetrated. See 2 Strong, N.C. Index 2d, Criminal Law, Section 60.

If the evidence is without "probative force" it is not "legally relevant."

The case of *State v. Smith,* 274 N.C. 139, 161 S.E.2d 449 (1968) is an interesting case on this point. It involved a North Carolina Highway Commission secretary who on April 8, 1966, left her wallet containing a twenty dollar bill and a ten dollar bill on her desk. Later that day she took her wallet to a store and made a purchase, using the ten dollar bill. Shortly afterwards, she realized the twenty dollar bill was missing and went back to the store where she had made her purchases, thinking perhaps she had accidently removed it from her wallet and it had dropped to the floor.

She saw the defendant each day thereafter in her room or office. On April 15, 1966 forty-one dollars in loose currency was missing from a drawer in the same secretary's desk. The defendant was a janitor. SBI agent Stephen R. Jones (the same fingerprint expert as in the instant case [A. 38]) took fingerprints of the defendant on 3 May 1966 and on July 11, 1967, Jones found Smith's fingerprints on plastic in the secretary's wallet on April 15, 1966. Smith was charged, only, with taking the twenty dollar bill.

The Supreme Court of North Carolina reversed Smith's conviction, holding the motion as of nonsuit should have allowed. In the opinion written by Parker, C.J., the court indicated, among other things, that it was not shown when Smith's prints got on the contents of the wallet reciting the rule that to warrant a conviction the fingerprint corresponding to the defendant's must have been found at the scene of the crime under such circumstances that it could *only* have been impressed *at the time* when *the crime was committed* and cited *28 A.L.R.2d 1115, 1154; State v. Combs,* 200 N.C. 671, 158 S.E. 252 (1931); *State v. Huffman, supra; State v. Helms,* 218 N.C. 592, 12 S.E.2d 243; *State v. Parker,* 230 N.C. 205, 52 S.E.2d 908; *State v. Tew, supra;* 30 Am. Jur. 2d, *Evidence,* Section 1144; and 3 Whorton's *Criminal Evidence,* Section 982, page 480.

30 Am. Jur. 2d, *Evidence,* Section 1144, says in part:

> ". . . To warrant a conviction, however, it has been held that the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed, under such circumstances that they could only have been impressed at the time the crime was committed. Where it appears that there were fingerprints other than those identified as the defendant's, which are neither identified nor explained, the proof of the defendant's prints is not sufficient to support a conviction."

If the evidence will not support a conviction it is "legally irrelevant" and immaterial. If it is "legally irrelevant" and

immaterial, the court should have granted the defendant's motion *in limine* and the objections to the introduction of the evidence with respect to the fingerprints. In the instant case, the trial judge had already heard the evidence with respect to the fingerprints which was neither identified nor explained and the evidence placing the defendant at the place of the crime more than an hour before a crime was committed. Therefore, had the court followed the decision of *State v. Minton, supra,* the evidence would have been precluded.

22A C.J.S., *Criminal Law,* Section 530(2) says:

> "Issues of fact can be determined only by the introduction of evidence made acceptable by statute or legal practice, and the accused is entitled to be tried on evidence properly admissible to establish the crime with which he is charged."

In this particular case the petitioner was entitled to be tried without the introduction of the incompetent and legally irrelevant evidence.

Without the fingerprint testimony, the testimony of the accomplice and the testimony of the "confession" would become much less significant. The evidence from the other sources in effect will diminish in its intensity since the fingerprint testimony was the primary source of illumination.

23 C.J.S., *Criminal Law,* Section 907, page 572, is as follows:

> "Where circumstantial evidence consists of a number of connected and interdependent facts and circumstances, it is like a chain which is no stronger than its weakest link; if any link is missing or broken, the continuity of the chain is destroyed and its strength wholly fails."

It may well be that the jury would not believe the testimony of the accomplice, ETHEL BEST, since she testified that the solicitor (prosecuting attorney), her lawyer, and she got together; and she was told to go to court and testify and get herself out of trouble (A. 51) together with the

statement by the solicitor that he had told her that he would not prosecute her and that after she testified the state took a *nol. pros.* (A. 51 and 17)

Also, without the identifying features of the fingerprint testimony, there could easily be a reasonable doubt with respect to the so-called confession before a police officer who had been trained for many years but who didn't bother to reduce to writing any of his efforts in connection with the investigation of this case, and in particular did not keep notes with respect to any conversations that may have transpired between the petitioner and him. (A. 29, 36, and 37) Is it reasonable to assume a competent, well-trained Chief of Detectives would investigate such a serious matter as a capital murder and not maintain any records of any kind, whatever?

In view of the fact that the first jury was unable to agree and the trial ended in a hopeless deadlock, and the second jury obviously compromised on a second degree murder, there must have been some great doubt in the minds of at least some of the jurors with respect to one or more of the elements of the alleged offense.

CONCLUSION

The defendant, this Petitioner, was denied equal protection under the laws, due process, and effective representation by the trial court's refusal to provide him and his counsel with the transcript of the evidence of the first trial in order to adequately prepare for the second trial and to use the transcript for impeachment purposes at the second trial so that the defendant could have effective representation. The court also denied the defendant due process and equal protection of the laws by admitting immaterial and legally irrelevant fingerprint testimony and failing to instruct the prosecution not to offer such testimony unless and until he could show that it was material and legally relevant outside the presence of the jury; that is show that it met the

tests laid down in *State v. Minton, supra,* as well as other cases cited above.

WHEREFORE, this Petitioner prays for a reversal of the conviction, and his immediate release or at least a new trial free from error and with a transcript of all preceding trials and hearings.

Respectfully submitted,

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